



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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Is the President Always Entitled to His Nominee?

Deference to Presidential Nominations

"The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States. . . ."

-- United States Constitution, Article II, section 2

"But might not his [the President's] nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. . . . [I]t is not likely that their [the Senate's] sanction would often be refused, where there were not special and strong reasons for the refusal."

-- Alexander Hamilton, *The Federalist* No. 76 (J. Cooke, ed.)

What deference is a President entitled to in his choice of nominees to serve in his administration? Is a President *always* entitled to his choice? The short answer is, **the President is entitled to (and always has been given) substantial deference, but he is not entitled to -- and never has been given -- unlimited deference.**

Even for appointments to the cabinet, a President does not always get his first choice. Nine cabinet nominees have been rejected on the Senate floor. The first was in 1834 when Roger B. Taney was rejected as Secretary of the Treasury because of a disagreement over the Bank of the United States. (Two years later Taney became Chief Justice of the United States.) The most recent rejection of a cabinet nominee was in 1989 when former Senator John Tower, President Bush's nominee for Secretary of Defense, was rejected because of questions about his personal life and potential conflicts of interest. [R. Garcia, "Cabinet and Other High Level Nominations that Failed to be Confirmed, 1789-1989", p. 4, CRS Rept. for Congress No. 89-253 GOV (revised April 14, 1989)] Other cabinet-level nominations have been withdrawn or died in committee. [*Id.*, p. 5]. **Nominees to lower-level positions also have been rejected, of course.** See, [*id.*, p. 6].

A substantial number of nominees were rejected because of disagreements over policy. [*Id.*, p. 7-10 (summarizing Senate's reasons for rejecting nominees)]. Sometimes the policy opinion was held by the nominee -- and sometimes it was held by the President. [*Id.*].

The following is a summary of the Senate's role in the confirmation process which is reprinted from pages 168-170 of what is perhaps the most important book on the subject, G. Calvin Mackenzie's *The Politics of Presidential Appointments* [Free Press, 1981].

The Senate's ultimate control over nominations -- the power to reject them or force their withdrawal -- is not often employed. It is seldom necessary, because conflicts between the Senate and the President, or between committees and nominees, are nearly always worked out at some earlier stage in the appointment process. In this fundamental way, the confirmation process is agreement-oriented. By design and tradition, it tends to generate compromise rather than conflict. Senators derive little political benefit and even less pleasure from the rejection of a nomination. It is a step they are likely to take only when all of the compromise mechanisms available to them have been explored and exhausted. This usually occurs when there is compelling evidence of conflict of interest or unethical behavior **or when the policy views of a nominee and the majority of a committee are beyond accommodation.**

In the mid-1970s, for instance, committee deliberations on the nominations of Ben Blackburn to head the Federal Home Loan Bank Board, Joseph Coors as a director of the Corporation for Public Broadcasting, and Theodore Sorensen as Director of the CIA all fell into the latter category and all led to the forced withdrawal of the nominations. **The philosophical and policy differences between these nominees and the committees with jurisdiction over them could not be compromised. But neither, in the committees' view, could they be tolerated.**

The point that emerges here is that public policy concerns are the dominant topic in the confirmation process and the dominant factor in most confirmation decisions. The Senate considers a number of things in formulating its confirmation decisions, but **no other single issue is as pervasive or as determinative as its concern over a nominee's likely impact on public policy.** Even when Senators cite other reasons as their basis for opposition to a nominee -- and they usually do -- often that is just a disguise for their displeasure with his political philosophy or his views on important policy issues.

It is equally important to note that this deep concern with the policy implications of nominations is not limited to any specific category of offices or agencies. The Senate has a tradition of acting deferentially toward nominees to the Cabinet and to other positions in the President's immediate "family." But that tradition is not sacrosanct. It does not prevent Senators from pursuing their policy concerns wherever they may lead. In fact, some of the most extensive -- and most abusive -- confirmation hearings of the postwar period have taken place over the Cabinet nominations of people like Lewis Strauss, Walter Hickel, Richard Kleindienst, and Griffin Bell.

On the surface, the confirmation process seems to be riddled with inconsistency. Two successive nominations by the same President to the same position may be treated in entirely different ways by the Senate. Hearings for one may be short, perfunctory, even laudatory, with confirmation coming the same day the nomination is received. The other may be subjected to intensive scrutiny that drags on for months before some final resolution is achieved. But this is not as inconsistent as it appears. There is a logic to it, a logic rooted deeply in the concern of individual Senators with basic issues of public policy. **The Senate is almost completely consistent in handling smoothly those nominations that raise no apparent policy problems and in examining rigorously those that do.** [All emphases added by RPC.]